83-199

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

LILIA KAPPAS,
Administratrix of the Estate of
Florence Kappas, deceased,
Petitioner

v.

CHESTNUT LODGE, INC., DEXTER BULLARD, JR., M.D.,
CORRINE COOPER, M.D., JOHN P. FORT, M.D.
SOL HERMAN, M.D., PING-NIE PAO, M.D.,
AND JONATHAN TUERK, M.D.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KENNETH MICHAEL ROBINSON
DENNIS M. HART
The Judiciary Manor
301 Eye Street, N.W.
Washington, D.C. 20001
Counsel for Petitioner

QUESTION PRESENTED

Was the Court of Appeals correct when it affirmed the District Court's decision, based on a tortuous and erroneous interpretation of a state statute, to exclude substantive evidence of medical malpractice thereby denying petitioner a fair trial and Due Process of Law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: *Page*

STATUTES:

CONSTITUTIONAL PROVISIONS:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

LILIA KAPPAS,
Administratrix of the Estate of
Florence Kappas, deceased,
Petitioner

v.

CHESTNUT LODGE, INC., DEXTER BULLARD, JR., M.D.,
CORRINE COOPER, M.D., JOHN P. FORT, M.D.
SOL HERMAN, M.D., PING-NIE PAO, M.D.,
AND JONATHAN TUERK, M.D.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit rendered its opinion on June 9, 1983. A copy of that opinion is attached in petitioner's appendix.

JURISDICTION

This case was a diversity case tried in the Federal District Court for the District of Maryland pursuant to 28 U.S.C. §1332 (a) (1). Jurisdiction of this Court is therefore invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT OF FACTS

In 1964 an individual named Florence Kappas entered a long term psychiatric care facility located in Rockville, Maryland. This institution was named Chestnut Lodge. Ms. Kappas, who was 46 years old at the time, had been transferred by her family from a state run facility in New York. Florence Kappas, at the time of admission to Chestnut Lodge had spent nearly three years at the New York facility, and had a history of mental disturbances that began in the 1940's.

Florence Kappas spent almost nine years at Chestnut Lodge. She was diagnosed as a schizophrenic and underwent intensive psychotherapy while at the Lodge. Ms. Kappas also had an eating disorder which caused her to generally refuse food and resulted in extremely low body weight. During the first five years of Florence's stay at Chestnut Lodge she had Dr. Dewayne Phillips as her psychotherapist. During this time significant progress was made in the battle against the patient's schizophrenia and her eating disorder.

In 1969, Dr. Phillips left the Lodge and Dr. Sol Herman was assigned as the psychotherapist for Florence Kappas. After an initial period in which there were ups and downs in the therapy, Florence Kappas entered a long period in which she became mute and refused to participate in the therapy with Dr. Herman. In 1970, Florence Kappas was allowed to spend evenings in a private room across the street from Chestnut Lodge. Nevertheless, during the days, she remained at the Lodge ward undergoing therapy in which she did not participate nor benefit from.

In May of 1973, Florence Kappas suffered a serious loss of weight. A physical examination by the Lodge immediately preceeding that period revealed no physcial abnormalities.

Nevertheless after her weight dropped to 82 pounds, Florence was admitted to a nearby medical hospital.

Upon admission to Suburban Hospital, Florence Kappas was declared mentally incompetent and underwent tests to determine the cause of her debilitated condition. On May 25, 1973 Florence Kappas died. Her immediate cause of death was listed as a pulmonary embolism.

On May 18, 1976, a civil action was filed for damages by Lilia Kappas, the sister of Florence, against Chestnut Lodge, Inc., and individual staff members. In addition the complaint named as defendants Suburban Hospital and several individual staff members. The complaint alleged medical malpractice, breach of contract and invasion of privacy on the part of the defendants.

A jury trial was held in March of 1981 as to Chestnut Lodge and its individual employee — respondents.[1] The jury found for respondens on all counts. An appeal was taken and in an opinion issued on June 9, 1983 the Fourth Circuit affirmed the verdict in all respects.

---

[1]Suburban Hospital and the individual Suburban defendants were severed.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED WHEN IT AFFIRMED A DISTRICT COURT'S INTERPRETATION OF A STATE STATUTE THAT DEPRIVED PETITIONER OF CRITICAL SUBSTANTIVE EVIDENCE OF MEDICAL EVIDENCE, THEREBY DENYING PETITIONER HER RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW

The tragedy of the life and death of Florence Kappas is not just that she was allowed to emotionally and physically deteriorate while in the care of Chestnut Lodge. The real tragedy is that this deterioration took place under the watchful eye of dozens of doctors, nurses and members of the Lodge staff. The supervision of Florence Kappas' decline by the medical and social staff and their continued failure to initiate preventive action underlines the callous disregard for decent human life which served as the basis for the petitioner's lawsuit.

Because of the unique nature of Florence Kappas' life as a long term patient in a psychiatric facility, the only method by which the petitioner could demonstrate the control and direction that Chestnut Lodge personnel had was through the patient care records maintained by the Lodge. Of these documents, three categories were present. The first were nurses notes, that is daily entries made by the ward staff. The second category were monthly progress notes by Dr. Herman, the psychotherapist. The last category consisted of the transcripts of periodic staff conferences designed to review Florence's progress. Of these only the staff conferences are able to demonstrate the various decisions made by the Lodge in Florences' life and the persons with knowledge and responsibility for those decisions.

On March 5, 1981, four days before trial, respondents filed

a motion *in limine* asking the trial court to preclude the petitioner from "introducing any and all records regarding the Medical Review Committee meetings concerning plaintiff Kappas held at Chestnut Lodge." The documents in question were produced by respondents in pre-trial discovery and had been extensively utilized by all of the expert witnesses. After petitioner attempted to utilize one of the staff conferences in the direct examination of a psychiatric expert, the District Court ordered a hearing. Dr. Dexter Bullard, Director of the Lodge then took the stand and testified to his belief that the staff conferences were statutorily protected. The District Court agreed with the position of respondents and, after a short recess, declared that the document (the December 9, 1970 staff conference) was inadmissable.

The District Court and the Court of Appeals based their decision on an interpretation of Article 43, §134A (d) of the Maryland Code (1980) which provides in part:

> "The proceedings, records and files of a Medical Review Committee are neither discoverable nor admissable into evidence in any civil action arising out of matters which are being reviewed and evaluated by the committee."

Section 134A (b) defines a "Medical Review Committee" and includes:

> "(3) A committee of the medical staff or other committee of a hospital: if the committee was formed and approved by the governing board of the hospital. . ."

Petitioner believes that the Courts below erred when they ruled these documents inadmissable and seriously prejudiced the presentation of petitioner's case.

A. ***The Chestnut Lodge Staff Conferences Are Not Within The Meaning Of The Statute And The District Court's Ruling To The Contrary Petitioner of Due Process of Law.***

Article 43, Section 134A was passed by the Maryland Legislature in 1976, three years after the last staff conference in question. It has subsequently been amended, although it remains basically as it did in 1976. The position of respondents at trial was that the staff conferences were the equivalent of Medical Review Committees and thus exempt from discovery and admission as trial evidence. However, the statute itself, as well as Dr. Dexter Bullard's testimony, undermines that position.

Petitioner maintains, as she did below, that Section 134A is designed to protect the confidentiality of Medical Review Committee that served as a peer review or disciplinary function only.

Although the legislative history of Section 134 A is very sparse, the few published references to the statute clearly refer to it as an attempt to protect and enhance in-house disciplinary review. *See*, Quinn, *Health Care Malpractice Claims Statute*, 10 U.Bal.L.Rev. 74, 78 n. 22 (1980).

In the only published judicial opinion involving the statute, the reasoning of the Maryland court's decision on 134A leads to the unescapable conclusion that the section was not designed to protect the type of documents which the District Court suppressed. *Unnamed Physician v. Commission on Medical Discipline*, 258 Md. 1 400 A.2d 396 (1979).[2] In that case, the documents were the product of a medical

[2] It should be noted that this was the only case law cited by the Court of Appeals in reaching its decision.

review committee whose purpose was disciplinary. 400 A.2d at 399. The entire thrust of the law, as that court saw it, was to protect such committees from undue harassment — because such committees serve an important role in improving health care by the imposition of standards of discipline. Nowhere is the discussion of health services provided to an *individual* exempted.

Moreover, the language of the statute itself suggests that the records involved in the grant of confidentiality are those documents relating to qualifications, competence and performance of health care providers in the context of disciplinary proceedings. To assert otherwise, as the District Court concluded, would immunize not only all documents, but all physicians from liability.

In addition, the only case cited by the respondents below, *Bredice* v. *Doctors Hospital*, 50 F.R.D. 249 (D.D.C. 1970), supports the rationale that Section 134A does not prevent disclosure. In *Bredice*, the plaintiff asked for the following material:

> (1) Minutes and reports of any Board or Committee of Doctors Hospital or its staff concerning the death of Frank J. Bredice on December 11, 1966.
>
> (2) Reports, statements or memoranda, including reports to the malpractice carrier, reduced to writing, pertaining to the deceased or his treatment, no matter when or to whom made.
>
> 50 F.R.D. 249, 250

It is clear that the yearly staff conferences that were recorded while Florence Kappas was alive bear no similarity to the documents sought in *Bredice*. The District Court reached the

heart of the difference when it declared that the *Bredice* documents, "are not part of current patient care but are in the nature of a retrospective review. . ." 50 F.R.D. 250 Petitioner in the present case sought to introduce no staff conferences conducted after the death of the patient. None of the evidence remotely resembles the discovery sought in *Bredice*.

The net effect of the District Court's ruling was devastating to petitioner's case. The materials in question had been disclosed to petitioner during pre-trial discovery, and she had built her entire theory of medical malpractice around them. When the District Court Judge ruled, in the middle of trial, that the staff conference transcripts were protected by the state statute and therefore could not be admitted as substantive evidence, he ended petitioner's chance for a fair trial and denied her Due Process of Law.

B. ***The Immunity of Section 134A Is Not Retroactive***

Assuming, *arguendo*, that the staff conferences in the present case are within that class granted immunity, it is clear from the statute that Section 134A does not contemplate retroactivity of application as ordered by the District Court.

It is axiomatic that one of the fundamental pre-conditions to the establishment of a privilege is that the "communications must originate in a *confidene* that they will not be disclosed." 8 Wigmore, Evidence, §2285 at 527, quoted in *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1098 (5th Cir. 1970). Clearly, there was no expectation of confidence present years before the statute granting it was enacted.

To extend retroactive confidentiality, as the District Court did, is to ignore the reasons for such a privilege and the very purpose beyond the statute to the detriment of the petitioner.

C. ***The Defendants Waived Any Privilege By Production Of The Documents.***

The reported judicial decisions in this area of privilege deal exclusively with the exercise of the right in response to a pre-trial discovery request. *See, Morse* v. *Gerity*, 520 F. Supp. 470 (D. Conn. 1981). In the instant case, however, the District Court ruled as inadmissable documents which already had been produced by respondents.

Not only had these documents been produced years before trial, but they had served as the basis for the initial conclusions by all of the psychiatric experts; served as a substantial foundation for their opinion letters, and served as a substantial foundation for their opinion letters, and served as a basis for such other discovery as depositions. Even the trial judge noted his chagrin at the "eleventh hour" attempt by respondents to prohibit the use at trial of the conferences.

The present asserted privilege is not a rule of Federal evidence, but rather a state-created shield. *See*, Rule 501, Federal Rules of Evidence. Traditionally, waiver is the intentional relinquishment of a known right. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). If Dr. Bullard's trial testimony is to be believed, Chestnut Lodge somehow "knew" that these staff conferences were privileged when they took place during 1964-1973. Thus, production by the Lodge at any time would constitute a knowing waiver. On the other hand, even discounting Dr. Bullard's precognition of immunity, it must be admitted that the material was produced after the enactment of the statute which allegedly granted immunity. Under either scenario, the disclosure was undeniably made by respondents knowingly.

Petitioner, of course, admits that disclosure in pre-trial dis-

covery does not automatically make something admissable at trial. However, it should be clear that if the impediment to an otherwise admissable item is the desire to maintain confidentiality, that when that confidentiality is destroyed through voluntary disclosure, the item becomes admissable. In confidential privilege situations, once confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege is irrelevant. *See*, California Evidence Code, §912, Graham, *Handbook of Federal Evidence* §511.1 p. 301 (1981); 8 Wigmore, *Evidence* § 2237 (1961).

Thus, even assuming the provisions of 134A do grant immunity once the production was made by respondents, the rationale of the statute evaporated and removed the legislative shield that prohibits admission.

CONCLUSION

The Court of appeals has erroneously created an immunity for the production of critical evidence, and reached that result by interpreting a state statute which did not purport to create such a sweeping immunity. The only state decision considering the statute reached a result contrary to the Court of Appeals. More importantly, the upshot of the Court of Appeals decision is that petitioner was denied a fair trial and Due Process of Law.

Respectfully submitted,

Kenneth Michael Robinson

Dennis M. Hart

The Judiciary Manor
301 Eye Street, N.W.
Washington, D.C. 20001
(202) 347-6100

Counsel for Petitioner

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1327

Lilia KAPPAS, Administratrix
of the Estate of
FLORENCE KAPPAS, deceased, *Appellant,*

v.

CHESTNUT LODGE, INC.; JAIME BUENAVENTURA, M.D.: DEXTER M. BULLARD, JR., M.D.; DEXTER M. BULLARD, SR., M.D.: CORRINNE COOPER, M.D.: MARTIN COOPERMAN, M.D.: JERRY DOWLING, M.D.; JOHN P. FORT, M.D.; OSWOLDO GUIMARAES, M.D.; SOL HERMAN, M.D.; ELIZABETH MOHLER: PING-NIE PAO, M.D.; DEWAYNE PHILLIPS, M.D.; JONATHAN TUERK, M.D.; and OTTO WILLS, M.D.; *Appellees.*

and

ROBERT R. MONTGOMERY, M.D.; JOHN C. SAIA, M.D.; and SUBURBAN HOSPITAL ASSOCIATION, INC. *Defendants.*

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued: January 13, 1983 Decided: June 9, 1983

Before HALL, MURNAGHAN and SPROUSE, *Circuit Judges.*

Dennis M. Hart (Kenneth Michael Robinson on brief) for Appellant; Roy L. Mason (Donahure, Ehrmantraut & Montedonico on brief) and William J. Carter (Joel M. Savits, Carr, Jordan, Coyne & Savits on brief) for Appellees.

SPROUSE, *Circuit Judge:*

This appeal involves a diversity action brought by Lilia Kappas, as administratrix of the estate of Florence Kappas, her deceased sister, against Chestnut Lodge, Inc. and various individuals associated with Chestnut Lodge.[1] Kappas' complaint alleged medical malpractice, breach of contract, and invasion of privacy on the part of the Chestnut Lodge defendants. The district court entered a judgment after a jury verdict in favor of the defendants and Kappas appeals. We affirm.

Defendant Chestnut Lodge is a private psychiatric care facility in Rockville, Maryland. Florence Kappas entered the institution in 1964, and was diagnosed as a chronic schizophrenic. She remained at the hospital, first as a resident and later as an outpatient, until shortly before her death in June, 1973. Although there was a dispute at trial concerning the cause of Kappas' death, testimony established that as a result of one of her psychiatric problems she ate irregularly and that her weight had dropped to 78 pounds in the month preceding her death. The immediate cause of her death was listed as a pulmonary embolism.

From the date of Florence Kappas' admission into Chestnut Lodge until 1969, her condition apparently improved under the care of her then treating psychiatrist, Dr.

---

[1] Kappas' complaint also named as defendants Suburban Hospital Association, Inc. and various individuals associated with the hospital. The district court granted a motion by these defendants for severance prior to trial, and they are not included in this appeal.

Dewayne Phillips. Following Phillips' departure in 1969, she was placed under the care of Dr. Sol Herman, after which she grew resistant to therapy. After Florence's death in 1973, Lilia Kappas filed this action pursuant to Maryland law, alleging malpractice on the part of Dr. Herman and others, breach of a third-party beneficiary contract by Chestnut Lodge, and invasion of privacy by various defendants responsible for administering psychotherapy and other forms of psychiatric therapy to her sister at the Lodge. The district court granted defendants' motion for a directed verdict of invasion of privacy claim. The jury then found for the defendants on all other counts.

The principal contention advanced by Kappas on appeal is that the district court erred when it refused to admit into evidence transcripts of certain Chestnut Lodge staff conferences. The hospital had held staff conferences in 1965, 1967, 1969 and 1973 relating to the treatment which the deceased received during the period prior to each conference. The conferences are an integral part of the administration of patient care at Chestnut Lodge. They were established by the Lodge's governing board as a means of evaluating the patient care and treatment programs at the hospital. All members of the hospital medical staff as well as other members of its clinical staff are invited to participate in the conferences. Discussions concerning individual patients are a regular part of the conferences, but do not become a part of a patient's chart or medical record at the institution. In the case of the deceased, the transcript of each conference was approximately 23 pages. During these conferences, the physicians and other hospital personnel having a role in Kappas' treatment discussed their impressions of the patient, her medical and family history, and her activities. The discussions also included comments by other physicians associated with the hospital.

The trial court ruled that the conferene transcripts were inadmissible by virtue of Article 43, section 134A(d) of the Maryland Code. That section provides:

> The proceedings, records, and files of a medical review committee are neither discoverable nor admissible into evidence in any civil action arising out of matters which are being reviewed and evaluated by the committee. This immunity does not apply to a civil action brought by a party to the proceedings of the review committee and claiming to be aggrieved by the decision of the committee. Also, this immunity does not extend to any records or documents considered by the committee which would otherwise be subject to discovery and introduction into evidence in a civil action.

Md. Health Code Ann. § 134A(d) (1980).[2]

Kappas contends that the statutue is designed only to protect the confidentiality of medical review committees functioning in a peer review or disciplinary capacity. She argues that it should not be interpreted to immunize the staff conference reports excluded by the trial court. Decisions of Maryland courts provide no guidance on the scope of section 134A.[3] The plain language of the statute, however, reflects

---

[2] Since the entry of judgment in the present case, the statute has been recodified under Md. Health Occ. Code Ann. § 14-601 (1981).

[3] In the only Maryland case interpreting the statute, *Unnamed Physician v. Comm'n on Medical Discipline*, 285 Md. 1, 400 A.2d 396 (1979), the court's inquiry was limited to the question of whether the records and files of a medical review committee were protected by the statute from the subpoena power of the state's Commission on Medical Discipline. The case, therefore, provides no guidance on the question presented here.

that the Maryland legislature intended a broader application than that urged by Kappas. It is true that the statute immunizes only the proceedings, records, and files of a "medical review committee." The definition of such a committee, however, is broad enough to include the Chestnut Lodge staff conferences.

Section 134A(a)(2) defines a medical review committee as a "committee or board described in subsection (b) of this section, which is engaged in carrying out one or more of the functions described in subsection (c) of this section." Section 134A(b) lists six categories of "medical review committees," including:

> (3) A committee of the medical staff or other committee of a "hospital" or "related institution" as defined under this article if the committee was formed and approved by the governing board of the hospital or related institution, or the committee operates pursuant to written bylaws that have been approved by the governing board of the hospital or related institution. . . .

Section 134A(c) provides:

> The medical review committee shall engage in one or more of the following functions:
>
> (1) Evaluating and improving the quality of health care rendered by providers of health care;
>
> (2) Evaluating the need for and the level of performance of health care rendered;
>
> (3) Evaluating the qualifications, competence and performance of providers of health care; and

> (4) Evaluating and acting upon matters relating to the discipline of any individual provider of health care.

The Chestnut Lodge staff conferences were established by the hospital's governing board and therefore satisfy the subsection (b)(3) requirement that a committee must be "formed and approved" by a hospital's governing board.[4] The staff conferences also satisfy the requirement that a committee engage in "one or more" of the functions described in section 134A(c). Although the conferences in issue focuses on Florence Kappas, they were structured to review such matters as the progress of patient care and the implementation of programs in the hospital, as well as the operation of different wards in the hospital. The conferences functioned generally as a round table discussion of the problems involved in treating schizophrenic patients like Kappas. The discussions involving Kappas did not become a part of her medical records, but served as a focal point for reviewing the type of treatment being rendered at Chestnut Lodge. they were thus well within the ambit of sections 134A(c)(1) and (2).

The immunity afforded by section 134A(d) is not limited solely to disciplinary matters, but applies to "matters which are being reviewed and evaluated by the committee." These "matters" include improving the quality of health care, evaluating the need for and level of performance of health

---

[4] There is likewise no question that the Chestnut Lodge is a "hospital" as defined under the then applicable statute, Md. Health Code Ann. art. 43, § 556(b) (1980), now codified under Md. Health-Gen. Ann. § 19-301(e) (1982).

care rendered, as well as disciplinary matters. The district court therefore properly excluded the conference reports as the proceedings of a "medical review committee."

We have reviewed the record, briefs and arguments concerning the other issues raised by Kappas and find no merit in them. The judgment of the district court is therefore affirmed.

AFFIRMED.

MURNAGHAN, *Circuit Judge*, concurring:

Interpretation of Maryland Code Article 43, Section 134(A)(d) resolves a question of considerable potential importance relating to the trial of medical malpractice cases. While I do not disagree withthe conclusion so carefully reached in the panel opinion, I perceive no need to agree either. For there is another, less extensive route to the same end result. I would not unnecessarily anticipate a decision by a Maryland court, especially the Maryland Court of Appeals, the final arbiter of the law of that State.

Kappas obtained the excluded conference reports through discovery, secured opinion letters from three physicians based in part on the contents of the conference reports, called two of them as expert witnesses where they were available to testify as to all relevant materials underlying their opinions, and was permitted to refer to the text of the conference reports in cross-examination of the witnesses for appellees.

Under those circumstances, I would simply rest decision affirming the judgment entered on the verdict below on F.R. Civ. P. 61.[1] I would leave for another day, and preferably another court, the construction of a statute raising several potentially difficult questions.

---

[1] No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.